IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 74-1263

LOU V. BREWER, WARDEN,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE STATES OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, FLORIDA, IDAHO, ILLINOIS, INDIANA, MARYLAND, MISSISSIPPI, NEBRASKA, NEVADA, NEW JERSEY, NEW YORK, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, UTAH, VIRGINIA, WEST VIRGINIA AND WYOMING.

FRED E. INBAU, ESQ.,
FRANK CARRINGTON, ESQ.,
Americans for Effective Law Enforcement, Inc.,
960 State National Bank Plaza,
Evanston, Illinois 60201,

JAMES P. MANAK, ESQ.,
National District Attorneys Association, Inc.,
211 East Chicago Avenue,
Chicago, Illinois 60611,
Counsel for Amici Curiae.

(Signatures Continued Inside Cover)

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

Of Counsel:

WILLIAM K. LAMBIE, ESQ.,

WAYNE W. SCHMIDT, ESQ.,

ROBERT G. HIGGINS,

HON. WILLIAM J. BAXLEY, ESQ.,

HON. BRUCE E. BABBITT, ESQ.,

FRANK T. GALATI, ESQ.,

HON. JAMES GUY TUCKER, JR., ESQ.,

HON. EVELLE J. YOUNGER, ESQ.,

WILLIAM E. JAMES, ESQ.,

HON. ROBERT L. SHEVIN, ESQ.,

HON. WAYNE L. KIDWELL, ESQ.,

CHRISTOPHER D. BRAY, ESQ.,

HON. WILLIAM J. SCOTT, ESQ.,

JAMES B. ZAGEL, ESQ.,

HON. THEODORE L. SENDAK, ESQ.,

DONALD P. BOGARD, ESQ.,

HON. FRANCIS B. BURCH, ESQ.,

HON. A. F. SUMMER, ESQ.,

KAREN GILFOY, ESQ.,

HON. PAUL L. DOUGLAS, ESQ.,

MELVIN K. KAMERLOHR, ESQ.,

HON. ROBERT LIST, ESQ.,

HON. WILLIAM F. HYLAND, ESQ.,

ROBERT DEL TUFO, ESQ.,

HON. LOUIS J. LEFKOWITZ, ESQ.,

SAMUEL A. HIRSHOWITZ, ESQ.,

HON. ALLEN I. OLSON, ESQ.,

HON. LARRY DERRYBERRY, ESQ.,

ROBERT McDONALD, ESQ.,

HON. DANIEL R. McLEOD, ESQ.,

HON. E. J. SALCINES, JR., ESQ.,

HON. VERNON B. ROMNEY, ESQ.,

WILLIAM W. BARRETT, ESQ.,

HON. ANDREW P. MILLER, ESQ.,

RENO S. HARP III, ESQ.,

HON. CHAUNCEY H. BROWNING, JR., ESQ.,

DAVID P. CLEEK, ESQ.,

HON. V. FRANK MENDICINO, ESQ.,

GERALD A. STACK, ESQ.

TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases.

Articles.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 74-1263.

LOU V. BREWER, WARDEN,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE STATES OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, FLORIDA, IDAHO, ILLINOIS, INDIANA, MARYLAND, MISSISSIPPI, NEBRASKA, NEVADA, NEW JERSEY, NEW YORK, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, UTAH, VIRGINIA, WEST VIRGINIA AND WYOMING.

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Letters of Consent to the filing of AELE, Inc., and the N. D. A. A., Inc., have been received from counsel for the Petitioner and the Respondent and these have been filed with the Clerk of the Court. States are not required to obtain consent to file as *amici curiae*.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE), is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives, AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness in dealing with crime.

The National District Attorneys Association, Inc., (NDAA) is a nonprofit, non-political, tax exempt corporation composed of approximately 6,000 members representing all 50 states. The purposes of the National District Attorneys Association are, *inter alia,* to improve and to facilitate the administration of justice in the United States and to promote the study of law and legal institutions.

To effectuate these aims the National District Attorneys Association for many years has utilized an Amicus Curiae Committee to file briefs in cases of national importance in the United States Supreme Court. The NDAA seeks to make known the views of all prosecutors in America and to bring before this Court their position on matters affecting the discharge of the duties of prosecutor.

The State Attorneys General filing herewith are the chief law enforcement officers of their respective states with oversight

for the fair and effective enforcement of the criminal law therein.

Because this case presents fundamental questions concerning the ability of the police to secure legally admissible confessions from criminal suspects, each of the *amici* believe that they have a direct interest in the outcome of this case.

ARGUMENT.

I. The Rationale of Miranda v. Arizona Is Too Restrictive and Should Be Abandoned in Favor of a More Flexible Standard.

Amici will not reiterate the legal arguments made by the Petitioner, although we are in complete agreement with them and we wish to associate ourselves with them. *Amici* will confine their argument to a brief consideration of the fundamental issue involved in this important case: whether the rationale of *Miranda* v. *Arizona,* 384 U. S. 436 (1966), as applied by the lower Federal courts is too restrictive and whether it should be abandoned in favor of a more flexible standard for evaluating the admissibility of confessions and other statements of the criminal accused.

To put our argument into perspective we turn to the dissenting opinion of Justice Stuart of the Supreme Court of Iowa in that court's decision which affirmed Respondent's state conviction for murder.[1] Stating that he dissented "reluctantly" and that he personally saw nothing legally or mor lly wrong with permitting police officers to use psychology to secure incriminating statements from a defendant without counsel, Justice Stuart nevertheless felt that *Miranda* v. *Arizona* compelled the reversal of the defendant's conviction.[2]

---

1. *State* v. *Williams,* 182 N. W. 2d 396 (1970).

2. *Ibid.,* p. 406. The Judicial gloss on *Miranda* largely reflects precise analysis of concepts like "custody" and "interrogation" and the attendant prophylactics raised. Little, if any, attention is given to the real purposes served by regulating police questioning

Justice Stuart then continued:

> *It seems to me the [Miranda] rule of law is unsound and that in the long run justice would be better served by applying it in accordance with its spirit and exposing the perverse result of its application.*[3]

The United States District Court for the Southern District of Iowa granted Respondent's petition for a writ of Habeas Corpus,[4] which holding was affirmed on a 2 to 1 vote by a panel of the United States Court of Appeals for the Eighth Circuit.[5] Thus, the Respondent's conviction is reversed below and the rigid application of the *Miranda* rule by the two lower federal courts is indeed exposed as a most "perverse result." We submit that the very perverseness of the result in this case should form a basis for this Court to abandon the rigid application of *Miranda* in favor of a much more flexible standard for evaluation of the admissibility of confessions and other statements of criminal suspects.

Support of this contention is to be found in a consideration of the following facts:

1. The Crime Involved Was Most Heinous and Reprehensible.

Even the United States District Court, in granting Respondent Habeas Corpus relief, so characterized the murder of 10 year-old Pamela Powers.[6] The State of Iowa in its Petition for a Writ of Certiorari has set forth some of the details of the sexual assault made upon the child before her death (p. 4). And in addition to the natural repugnance felt at the release of such a murderer, it is clear that the outright release of such an individual would present a very real danger to society.

practices. See Zagel "Confessions and Interrogations After Miranda" (National District Attorneys Association, Inc., 5th Edition, 1975).

3. *Ibid.*
4. 375 F. Supp. 170 (1974).
5. 509 F. 2d 277 (1975).
6. 375 F. Supp. 170 at 186.

2. There Is Overwhelming Evidence of the Guilt of the Respondent.

This fact was again conceded both by the dissenting justices of the Supreme Court of Iowa,[7] and by the United States District Court.[8] This Court is not concerned in the instant case with a situation where there is some doubt as to the actual guilt or innocence of the defendant. If this were a case, for example, in which a confession was beaten or otherwise extorted from a criminal defendant there could well be a legitimate doubt as to his guilt. This is certainly not the situation in the instant case. Respondent led the police to the body of the victim, the location of which he, and only he, was aware. He also told the police of the locations at whch he disposed of the victim's shoes and the blanket in which he had wrapped the body. Since it is unquestioned that the *only* "pressures" used by the police against the Respondent were extremely subtle, it should likewise be unquestioned that this is not by any stretch of the imagination a case in which a false confession has been extorted from an innocent person.

3. A Successful Retrial of the Respondent Will Be Difficult, If Not Impossible.

The murder of Pamela Powers took place on December 24, 1968, and more than seven years have elapsed since the crime was committed. Even if there had been witness testimony to prove guilt beyond a reasonable doubt at the original trial, it would be difficult to retry a defendant after such a time lapse; witnesses may be unavailable, even dead, and certainly there would be an attrition of the accuracy of their recollection by reason of the passage of time.

The state's burden will be increased manyfold if the statements in this case are suppressed because they constitute *the* indispensible evidence linking Respondent with the body of the deceased and with other physical evidence of his guilt. Indeed,

7. 182 N. W. 2d 396 at 406.
8. 375 F. Supp. 170 at 186.

since Respondent led the police to the body of Pamela Powers (and it is problematical if they could have found it in any other way), the prosecution would have difficulty even in proving the death of the victim if this evidence is supressed on the basis of it being derivative of Respondent's statements and demonstrations. As we previously noted, there is overwhelming evidence of Respondents *factual* guilt, but, if most of this evidence is excluded, upon retrial the prosecution will experience extreme difficulty in proving Respondent's *legal* guilt beyond a reasonable doubt.

4. The Conduct of the Authorities in This Case Was Not in Any Way Oppressive.

There is no evidence whatever in the record that the police used any oppressive or coercive tactics towards the Respondent. He was advised of his rights under *Miranda* on three occasions and had consulted with two attorneys. It appears from the record that he made the three statements relating to the locations of the blanket, the shoes, and the body spontaneously and not in response to any sort of questioning. In fact, it appears that his attorney had told him something to the effect that he would have to tell the officers where the body was.[9]

The sole source of *any* conceivable police "misconduct" in this case transpired when Captain Leaming made the statement to Respondent about finding the body. Captain Leaming testified:

> Eventually, as we were travelling along there, I said to Mr. Williams that, "I want to give you something to think about while we're travelling down the road." I said, "Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way to Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."[10]

9. 182 N. W. 2d 396 at 403.

Then, although it is not quoted in the majority opinion of the Eighth Circuit, Captain Leaming testified that he told Respondent:

> *"I do not want you to answer me. I don't want to discuss it any further."*[11]

These statements were made by Captain Leaming to the Respondent *near the outset* of the trip from Davenport to Des Moines. The record indicates that all other conversation initiated by Captain Leaming during the trip was innocuous, and that Respondent, some *two hours later,* as the car neared Grinnell. Iowa, spontaneously stated that he had left the victim's shoes at a nearby gas station, and that he showed the officers where he had left them (although by then they were gone). Respondent similarly volunteered his statements about the location of the blanket and the body.

The only subtle pressure which *might* have elicited Respondent's statements and subsequent demonstrations by him was the single comment by Captain Leaming about his desire to locate the body, which comment was followed by a caution to the Respondent not to answer.[12] The Iowa Supreme Court held that

10. 509 F. 2d 227 at 230.

11. 509 F. 2d 227 at 235 (dissenting opinion).

12. The lower courts noted that Captain Leaming falsely told Respondent that he knew that the body was located near Mitchellville, Iowa. However, This Court has held that a misrepresentation by an interrogator to a suspect need not of necessity vitiate the validity of a confession. *Frazier* v. *Cupp,* 394 U. S. 731 (1969). See also *Michigan* v. *Mosley,* 44 USLW 4015 (1975) in which it was

this was not the sort of conduct which so overbore Respondent's will that, in the totality of the circumstances, he could not have voluntarily waived his right to remain silent. We believe that this is a proper interpretation of the facts and the law, and one that should be adopted by this Court.

When the totality of the circumstances in this case is examined, the picture emerges of a suspect who had been thoroughly apprized of his rights, and who had in fact consulted counsel, making admissions spontaneously and not in response to questioning, some two hours after a police officer had suggested to him that he reveal the location of the body and who had cautioned Respondent not even to respond to that suggestion. We submit that only a tortured, rigid, and entirely unrealistic interpretation of *Miranda* would require the suppression of Respondent's statements in this case.

Much has been made in the lower court opinions of Captain Leaming allegedly "breaking his promise" to Respondent's attorneys, not to question him. If Captain Leaming did wilfully do so, this was certainly ill-advised, but, as Judge Webster pointed out in his dissent from the Eighth Circuit decision below, this should not be held to preclude Respondent from waiving his privilege at a later time. 509 F. 2d 227 at 236.

Additionally we submit that certain facts in the record militate against a finding that Captain Leaming *wilfully* sought to violate defendant's rights.

It is possible, that Leaming believed that he had only promised to refrain from *questioning* Respondent. He did not, in fact, question Respondent; he merely made a statement to him, and then he cautioned Respondent not to respond to the statement. This is more than a matter of semantics. Captain Leaming is not an attorney and the direction to him not to *question* Williams may have, in his mind, meant just that.

---

noted that a detective falsely told Mosley that an accomplice had confessed and implicated him; yet the conviction was affirmed. 44 USLW 4015, Ft. 3.

The District Court found that as a matter of *law*, Leaming's statement constituted "interrogation." (375 F. Supp. 170 at 177). But to a layman there could well be a distinction between "questioning" someone and "talking" to him. In other words, Captain Leaming could have believed that his conduct was in compliance with his promise to the attorneys.

Captain Leaming did not engage in any generalized questioning of Respondent. His testimony indicates that when he made his statement to Respondent he was primarily concerned with finding Pamela Powers' body for burial. His statement that he feared Respondent would be unable to find the body if the ground should become snow-covered is lent some credence by the fact that Respondent himself was unable at first to find the correct back road which led to the child's burial site. From the record it appears that Captain Leaming did not initiate any other conversation with respondent as to any aspect of his guilt.

This Court stated in *Michigan* v. *Tucker*:

> *Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.* 417 U. S. 433 at 446 (1974).

We believe that this characterization may well be appropos to the conduct of Captain Leaming.

This Court has, in recent years, recognized that a rigid and uncompromizing adherence to the dictates of *Miranda* can be inimical to the effectiveness of law enforcement. At the same time, the pronouncements of the Court have been to the effect that *fundamental* Fifth and Sixth Amendment rights can be properly safeguarded even though some flexibility has been accorded to the police in the task of investigating crime and, in particular, securing legally admissible statements from criminal

suspects. *Harris* v. *New York*, 401 U. S. 222 (1971); *Michigan* v. *Tucker*, 417 U. S. 433 (1974); *Michigan* v. *Mosley*, 44 USLW 4015 (1975).

Amici have never taken the position that mere expediency in the law enforcement process should be used to justify an erosion of basic Constitutional rights. On the other hand, we believe that a careful concern for the effectiveness of law enforcement has its legitimate place in the determinations of this Court. In the instant case the holdings of the lower federal courts epitomize the adverse impact of *Miranda* upon that effectiveness: rigidity of interpretation, the elevation of form over substance, the irrelevance of guilt,[13] and the continuing microscopic examination of police conduct in search of some slight infraction on the part of the police which necessitates the reversal of convictions and the freeing of the guilty.

The instant case presents a vehicle for this Court to re-examine the entire scope of the Miranda opinion. The factors which we suggest should be of concern in such a re-examination are all clearly present: a crime of the most heinous nature; the obvious guilt of the defendant; difficulty, if not impossibility, of a successful retrial; and a complete lack of any sort of wilful or concerted misbehavior on the part of the police. The last of these factors is perhaps the most important. At the very *worst* the police officer in this case can be accused of making one ill-considered statement to the accused (with a caution not to answer it) out of the presence of his attorneys; at all other times the rights of the accused had been scrupulously observed.

We do not believe that a minor infraction such as this one of the dictates of *Miranda* should be cause for the reversal of the

13. One United States District Court has characterized this aspect of *Miranda* with admirable candor. It stated that the focus of the Fifth Amendment had :

" . . . *been broadened from protecting the innocent, from the possibility of a false confession to protecting the* guilty *from unfair methods of procuring statements from him. United States, ex rel. Chabonian* v. *Leik, Director*, 366 F. Supp. 82 (E. D. Wis. 1973), emphasis supplied.

conviction in a case of this nature. We urge this court to abandon the rigid dictates of *Miranda* and to add an element of flexibility to the good faith efforts of the police to enforce the law. For these reasons we urge the Court to reverse the judgment of the United States Court of Appeals for the Eighth Circuit and to affirm the conviction of Respondent herein.

CONCLUSION.

We believe that the instant case provides this Court with an excellent vehicle to examine the question whether the rigid application of the dictates of *Miranda* v. *Arizona* should continue to require the perverse result which will surely transpire if Respondent's conviction is to be reversed.

Certainly the police conduct in this case was not oppressive or coercive, yet if the decisions of the federal courts below are upheld, a defendant convicted of a most heinous crime, whose factual guilt is patent, must be retired (in circumstances of extreme difficulty for a successful re-prosecution) or must be freed.

We do not believe that *Miranda* should be applied so as to dictate such a result; rather we believe that the rationale of *Miranda* which *does* dictate such a result should be abandoned. We urge this Court to reverse the decision of the United States Court of Appeals and to affirm Respondent's conviction.

Respectfully submitted,

FRED E. INBAU, ESQ.,
FRANK CARRINGTON, ESQ.,
Americans for Effective Law
Enforcement, Inc.,
960 State National Bank Plaza,
Evanston, Illinois 60201,

JAMES P. MANAK, ESQ.,
National District Attorneys
Association, Inc.,
211 East Chicago Avenue,
Chicago, Illinois 60611,
Counsel for Amici Curiae.

Of Counsel:

WILLIAM K. LAMBIE, ESQ.,
WAYNE W. SCHMIDT, ESQ.,
ROBERT G. HIGGINS,
Americans for Effective Law Enforcement, Inc.,

HON. WILLIAM J. BAXLEY, ESQ.,
Attorney General, State of Alabama,
Montgomery, Alabama,

HON. BRUCE E. BABBITT, ESQ.,
Attorney General,

FRANK T. GALATI, ESQ.,
Assistant Attorney General, State of Arizona,
Phoenix, Arizona,

HON. JAMES GUY TUCKER, JR., ESQ.,
Attorney General, State of Arkansas,
Little Rock, Arkansas,

HON. EVELLE J. YOUNGER, ESQ.,
Attorney General,

WILLIAM E. JAMES, ESQ.,
Senior Assistant Attorney General, State of California,
Sacramento, California,

HON. ROBERT L. SHEVIN, ESQ.,
Attorney General, State of Florida,
Talahassee, Florida,

HON. WAYNE L. KIDWELL, ESQ.,
Attorney General,

CHRISTOPHER D. BRAY, ESQ.,
Deputy Attorney General, State of Idaho,
Boise, Idaho,

HON. WILLIAM J. SCOTT, ESQ.,
Attorney General,

JAMES B. ZAGEL, ESQ.,
Assistant Attorney General, State of Illinois,
Chicago, Illinois,

HON. THEODORE L. SENDAK, ESQ.,
Attorney General,

DONALD P. BOGARD, ESQ.,
Executive Assistant Attorney General, State of Indiana,
Indianapolis, Indiana,

HON. FRANCIS B. BURCH, ESQ.,
Attorney General, State of Maryland,
Annapolis, Maryland,

HON. A. F. SUMMER, ESQ.,
Attorney General,

KAREN GILFOY, ESQ.,
Assistant Attorney General, State of Mississippi,
Jackson, Mississippi,

HON. PAUL L. DOUGLAS, ESQ.,
Attorney General,

MELVIN K. KAMERLOHR, ESQ.,
Assistant Attorney General, State of Nebraska,
Lincoln, Nebraska,

HON. ROBERT LIST, ESQ.,
Attorney General, State of Nevada,
Carson City, Nevada,

HON. WILLIAM F. HYLAND, ESQ.,
Attorney General,

ROBERT DEL TUFO, ESQ.,
First Assistant Attorney General, State of New Jersey,
Trenton, New Jersey,

HON. LOUIS J. LEFKOWITZ, ESQ.,
Attorney General,

SAMUEL A. HIRSHOWITZ,
First Assistant Attorney General, State of New York,
New York, New York,

HON. ALLEN I. OLSON, ESQ.,
Attorney General, State of North Dakota,
Bismarck, North Dakota,

HON. LARRY DERRYBERRY, ESQ.,
Attorney General,

ROBERT McDONALD, ESQ.,
Chief, Criminal Division, State of Oklahoma,
Oklahoma City, Oklahoma,

HON. DANIEL R. McLEOD, ESQ.,
Attorney General, State of Carolina,
Columbia, South Carolina,

HON. E. J. SALCINES, JR., ESQ.,
States Attorney, Hillsborough County,
Tampa, Florida 33602,

HON. VERNON B. ROMNEY, ESQ.,
Attorney General,

WILLIAM W. BARRETT ESQ.,
Assistant Attorney General, State of Utah,
Salt Lake City, Utah,

HON. ANDREW P. MILLER, ESQ.,
Attorney General,

RENO S. HARP III, ESQ.,
Deputy Attorney General, Commonwealth of Virginia,

HON. CHAUNCEY H. BROWNING, JR., ESQ.,
Attorney General,

DAVID P. CLEEK, ESQ.,
Assistant Attorney General, State of West Virginia.

HON. V. FRANK MENDICINO, ESQ.,
Attorney General,

GERALD A. STACK, ESQ.,
Deputy Attorney General,
Cheyenne, Wyoming,